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No. 94-314

In the

Supreme Court of the United States

October Term, 1994

RALPH UNDERWAGER and
HOLLIDA WAKEFIELD,

Petitioners,

v.

ANNA SALTER, PATRICIA TOTH, MIMI ROSE,
NATIONAL CENTER FOR
PROSECUTION OF CHILD ABUSE,
AMERICAN PROSECUTOR'S RESEARCH INSTITUTE,
NATIONAL DISTRICT ATTORNEYS' ASSOCIATION,
CHARLES VAUGHAN AND JAMES PETERS,

Respondents.

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF STATE VOCAL ORGANIZATIONS, INC. IN SUPPORT OF RALPH UNDERWAGER AND HOLLIDA WAKEFIELD, PETITIONERS

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Respondents

On Petition for Writ of Certiorari to the
Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The National Association of State VOCAL Organizations, Inc. represents over 115 state and local VOCAL groups and hereby respectfully moves for leave to file the attached brief *amicus curiae*. The attorney for the plaintiffs has consented. One firm of attorneys for the respondents has rejected our request for their permission to file the brief. The stated reason for the refusal is ". . .the filing of an Amicus Curiae brief by you would be primarily for political purposes and will not

bring to the attention of the Court matters which will not be submitted by the parties." Mr. Vaughn refused permission claiming the action was frivolous lawsuit. His letter also carries the heading "Re: Letter from your organization on behalf of child abusers". Mr. Vaughn demonstrates in his letter of refusal the most important reason for our filing this brief. He asserts that NASVO is an organization protecting and representing guilty child abusers. The Respondents consistently attack, defame, and slander anyone who attempts to speak up for reason, balance, and accuracy in dealing with child abuse. This is the Monopoly Theory of justice. When accused, "Go to Jail. Go Directly to Jail." Do not stop for a claim of fair and equitable justice.

This brief supports the plaintiffs' petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit. The National Association of State VOCAL Organizations, Inc. has ten years of experience in attempting to respond to the needs of persons falsely accused of child abuse and their friends and families who observe the devastation and harm done and become alarmed by what they see happening. When even Readers' Digest titles an article about the system dealing with child abuse "Justice Gone Crazy"[1], it is time to begin to ask what is going on that there should be such a perception? NASVO daily fields calls and contacts from persons all over this land who firmly believe that the system of justice they have experienced or observed is unfair, tyrannical, and oppresive. We hear again and again the belief that what social workers, police, prosecutors, and judges do when dealing with child abuse allegations is like the Nazi storm troopers or the KGB. NASVO works hard to channel the frustration, resentment, and anger of this ever

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[1] Armbrister, T. (1994, January). Justice gone crazy. Reader's Digest, pp. 33–40.

growing number of American citizens into constructive and responsible efforts to improve the system. We strive to support the concept of increasing the accuracy of the decisions made by the justice system. It can hardly be denied that greater accuracy benefits everybody. Yet, the gains made are small, scattered, and require sustained and serious comittment by VOCAL members.

We are also very aware of the bitter and cynical view that more and more American take of their political structure. We know that almost every current political commentator believes there is a large group of citizens who believe the political process is a sham and a hoax. We know that politicians also express dismay about the level of rancor and animosity that now pervades public discourse. The personal attacks made on almost every public figure include a growing level of falsehood, defamation, misinterpretation, exaggeration, and vitriol. We believe the justice system must lead the way and set an example of valuing truthfulness, fairness, honesty, and a reasoned cooperative search for justice by all parties in disputes. Therefore, this case offers the Court an opportunity to seek an advance in restoring civility and reason to our public dialogues and to increase the accuracy of the decision making process of the entire justice system.

We do not understand the objection of respondents that filing this brief is for political purposes and therefore they would deny us access to the system of justice. What other recourse does a citizen have? The District judge already rejected the defendants's motion to find the suit a frivolous action and ruled it was not. Mr. Vaughn's reason for refusing our request for permission does not accept that judgment.

For the foregoing reason, the National Association of State VOCAL Organizations, Inc. respectfully urges the Court to accept and file the enclosed brief *amicus curiae* in support of the petitioners, Ralph Underwager and Hollida Wakefield.

Respectfully submitted,

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Brief of the
National Association of State VOCAL Organizations
as Amicus Curiae
in support of the Petitioners.

Interest of Amicus Curiae

This *Amicus Curiae* brief is submitted by the National Association of State VOCAL Organizations, Inc. (NASVO), which represents, as their national entity, 115 chapters of differing state organizations of VOCAL, or Victims of Child Abuse Laws. NASVO acts as a coalescent association that

provides information and professional guidelines to VOCAL organizations. NASVO was originally formed in 1987 to bring together the various VOCAL chapters throughout the country to represent VOCAL's concerns regarding the laws affecting families and children on a national level, rather than state by state. NASVO has convened several conferences in Washington, D. C. to bring together government officials, political figures, and concerned citizens and continues to sponsor such conferences.

Originally founded in 1984, VOCAL, in the beginning, consisted primarily of parents who were falsely accused of abuse or neglect, usually during a custody battle in family court. Then, relatives, friends, and concerned citizens who were alarmed by what they saw happening to families and friends became involved in VOCAL. Soon, other individuals who worked with children joined VOCAL, such as teachers, foster parents, and social workers who had found themselves observing and feeling the sting of false accusations. Many suffered not only the loss of reputation, jobs, and financial security, but most often the loss of their children. Even after acquittal, or a finding by a court that the accusation was unfounded and false, the damage to these families was total and devastating. In the late 1980s VOCAL also began receiving calls from children who languished in foster care and whose concerns were never addressed by their social worker or their guardian ad-litem. VOCAL also received complaints about child protection services regarding understaffing, lack of available time to assess cases or for contact with clients, unreasonable case-loads, and coercion to conform to ideological positions from those who worked within child protection agencies,.

After researching the issue of child abuse and neglect, VOCAL realized that while the need to protect children is paramount, the method in which government intervened on

behalf of children was more often damaging to children and families rather than beneficial. Since 1979, every scientific analysis of the level and kind of error committed by the system has reached the same conclusion. The error is an unconscionable level of false positives ranging from the lowest figure of three false positives to every true positive to over 200 to 1.[1] Such unanimity in science across so many years and differing investigators is strong evidence for the need to improve what is done to respond to accusations of child abuse. VOCAL also became acutely aware of the need for an accountable, professional child protection system from the first report through the investigation and intervention. There is need for an educated judiciary and the need to bring about equity to all, including families and children, under the law. At that point VOCAL began a national crusade to *improve* child welfare and protection policy and law. The basic goal of VOCAL is to increase the accuracy of the decision making process throughout the system and at all levels. The representative of VOCAL's viewpoints to these national issues is NASVO.

NASVO has the experience of dealing with thousands of people who have been accused, determined *not* to have abused any child, but whose experience has convinced them that the present justice system dealing with this issue is unjust, and does not protect them but rather denies their constitutional rights. While NASVO supports the justice system in it's efforts to seek truth, to punish the guilty and acquit the innocent, we must deal with the perception of these thousands of citizens that the experience of being falsely accused of child abuse was not one in which they met a judicial system that was fair. Regardless of

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[1] Wakefield & Underwager (1994) The alleged child victim and real victims of child sexual abuse. In Krivacska & Money,*The Handbook of Forensic Sexology*, New York, Prometheus Books, 223–264.

the outcome, they feel they were treated as though considered guilty and that the burden was upon them to prove their innocence. They feel that the constitutional protection against unwarranted search and seizure, and that right of their children, had been relinquished through accusation alone. They feel that due process and equal access to the courts is an illusion, in that only those who can pay for justice receive it, and even then justice is only meted out to those who are not ground into dust by the overwhelming powers and resources held by the state. NASVO/VOCAL presents this Amicus Brief out of concern for the rights of the accused and children to due process under the law and to move toward our goal of increased accuracy of decision making. We feel that should the lower court's decision in this case be upheld, there will be a critical effect not only upon the court system's balance, but on the constitutional rights of the accused. We also believe that letting stand the lower court's imposition of the heightened standard of actual malice applied to prosecutors and their allied scholars cannot help increase accuracy but rather can serve only to increase the unacceptable level of error already demonstrated by scientific analysis. The tragic consequences of inaccuracy and error are shown in the death of 86 American citizens under the treads of American battle tanks as a result of a faulty decision made by the Attorney General of the United States. That fatal decision was based upon believing a false report of child sexual abuse. That false report was developed by the techniques and methods accepted and supported by the prosecutors and the National Center for the Prosecution of Child Abuse but challenged and questioned by the Plaintiffs.

BACKGROUND

The case of *Underwager and Wakefield v. Salter, et. al*, concerns the defamation of expert witnesses who testify primarily for the defense in child abuse cases. The defamation

was disseminated by the Defendants to prosecutors and other interested parties throughout the country at various conferences and seminars, both at these meetings and by mail. The lower courts have found that the Defendants-Appellees are immune under standards of law that require the Plaintiff's to prove "actual malice" under *New York Times v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 686 (1964), that they are immune under the "common interest privilege"as defined in section 596 of the Restatement 2d of Torts, and that their defamation is based upon "true belief" that it is factual, and is backed by articles published by others involved in child abuse law.

We regard this case as much more than a simple defamation issue. In order to understand that this is not just a case regarding defamation, one must look at the history of child abuse law, and the evolution of the rules of evidence in these cases. While states differ, much ground has been covered in this area. Soon after the enactment of the *Child Abuse Prevention and Treatment Act* (the Mondale Act) of 1973, the country began to witness an industry growth in the area of experts and agencies who claimed to be "child advocates". Some of these early experts provided information to courts as "proof" that a child had been abused, or that the accused was an abuser, by fitting a "profile" claimed to be typical of abused children. Based upon that kind of information (which in those early years was not disputed), a majority of those accused of child abuse found themselves convicted. Later, case law began to catch up to this new area of evidence and procedure, and indeed found that statements regarding a "profile" by an expert expressed to a jury or finder of fact was prejudicial in that it "invaded the realm of the jury", and made a determination that the defendant was guilty based upon the prosecution expert's own personal judgment. Other cases were overturned because of the use of the "Child Sexual Abuse Accommodation Syndrome" Summit, Roland S., M.D. *Child Abuse & Neglect* Vol. 7, pp. 177–193 (hereafter cited as

the CSAAS), which now is not admissible in court in some states to show that a particular child was a victim of sexual abuse. *See Hellstrom v. Commonwealth*, 825 S.W. 2d 612 (Ky. 1992); *People v. Knupp*, 579 N.Y.S.2d 801 (N.Y. App.Div. 1992); *Commonwealth v. Dunkle*, 602 A.2d 830 (Pa. 1992); *State v. Dodson*, 452 N.W.2d 610 (Iowa Ct. App. 1989).

The most recent decision in this direction has been in *State of New Jersey v. Michaels*, 264 N.J. Super. 579, 625 A.2d 489 (1993), where the New Jersey Superior Court, Appellate Division ruled that the CSAS and the CSAAS were controversial theories and could not be used to prove sexual abuse. The court followed a decision handed down a month before by the New Jersey Supreme Court, which adopted the conclusion that, "The proper use of child-abuse expert testimony is... not as a diagnostic investigative device, as the syndrome does not detect the sexual abuse." The Superior Court in its decision stated, "It would appear that the prospect of designing checklists, inventories and rating scales to provide objective measures of abuse behavior, its antecedents, correlates, and consequences, hold promise of yielding information that may be useful both in individual and epidemiological data gathering. Designing and validating such measures, however, depends on theory and research that is currently the focus of much study and controversy." Such controversy is part of our growth into knowledge.

We must add that on June 23, 1994, the New Jersey State Supreme Court again ruled in Michaels' favor, regarding the efforts of the prosecution to retry the case, basing it's decision upon the problems established by the repeated and coercive nature of the interview techniques of the prosecution imposed upon the children. *State v. Michaels*, 136 N. J. 299, 642 A.2d 1372 (1994). The New Jersey Supreme Court ruling adopts and affirms the substance of the testimony given by Plaintiffs in

that trial. They were the experts for the defense. The New Jersey Supreme Court also speaks of ". . .the egregious prosecutorial abuses evidenced in this record." 642 A.2d at 1385. In the trial the prosecution made savage personal attacks on the Plaintiff and twice in the presence of the jury described the way the prosecutors were building a book on the Plaintiffs to make sure they would never again testify in a trial in the U. S..

Such cases clearly show the efforts of the judicial process in seeking remedies to problems that promote criminal acts or victimize members of our society. The seeking of information is vital to this process. One basis for determining the validity of information was known as the "Frye Standard" holding that a scientific technique is not admissible unless the technique is "generally accepted" in the scientific community. *Frye v. United States*, 293 F. 1013 (1923). Only after a technique had passed through an "experimental phase" where it is scrutinized by the scientific community and has entered into the "demonstrable" stage, could it be admissible. However, this standard had problems because under the Frye rule, it is not enough that a qualified expert or experts believe the technique is valid. It must be accepted by the relevant scientific community. This created more controversy and also a vacuum in efforts to seek information, particularly in child abuse cases.

Then new case law gave precedent to the method in which courts could hear more information, allow more argument as to the application of expert testimony, and would be allowed to draw clearer conclusions based upon testimony and evidence presented. In *Daubert v. Merrell Dow Pharmaceutical, Inc.*, Supreme Court of the United States, No. 92-102 (filed June 28, 1993), the courts are provided guidelines with which to determine the "falsifiability" of new scientific or mental health developments provided to courts as evidence. This process allows for the free exchange of new information, and the

examination *by the court* as to it's applicability and validity to a case before the bar, rather than waiting on the process of general opinion and acceptability of the professional community, which is often tainted by the politics and popular cause of the day, rather than fact.

We point this out to establish the importance of expert witness testimony, and that to eliminate information from one point of view (in this case, the defense of child abuse cases) endangers the process by which we seek information to achieve justice.

SUMMARY OF ARGUMENT

While the U. S. District Court and the Court of Appeals for the Seventh Circuit upheld the claims of the Defendants-Appellees for summary judgment, they did find that the acts of the Defendants-Appellees certainly were defamatory and malicious, but granted them immunity under *New York Times v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 686 (1964). It is apparent that these courts erred in this conclusion in light of the fact that the Respondents-Appellees had gone beyond the "common-interest privilege" through the dissemination of this information to those individuals who were not involved in the prosecution of these cases, by virtue of publicly attended seminars and conferences. The defendants also distributed their defamatory material to anyone, professional or not, who wanted to attack the plaintiffs. They also distributed the defamatory material in foreign countries. The court also believed that the published critiques of the Petitioners-Appellants' work, which supported the "beliefs" held by the Respondents-Appellees, were the opinions of unbiased, independent professionals, when in fact these critics are colleagues of the Respondents through the American Professional Society on the Sexual Abuse of Children (APSAC), an organization that is also prosecution-oriented.

This case also goes beyond a normal defamation case in that the Respondent-Appellees have a specific goal to attack the reputation of *any* defense expert witness by "making them commercially undesirable", and thus establishing only prosecutorial experts as the sole means by which a court of law can access information and research regarding the difficult and highly sensitive issues surrounding child abuse cases. Because any defendant has the right to bring forth evidence and witnesses on his or her behalf that will enable him to provide a viable, factual, basis from which to establish his innocence, and that this is an integral part of due process, to impeach and attack defense expert witnesses through innuendo, gossip, and defamation, is a direct violation of that due process.

ARGUMENT

I. The issue regarding the respondents' defamatory acts, acts already determined by the lower courts as fact, is clearly not immunized under the provisions set forth in *New York Times v. Sullivan,* due to past and present actions by the respondents, and are further not protected under the "common interest privilege".

Twice in the District Court, the actions of the Respondents were determined to be defamatory as a fact of law, and twice the Appellate Court described the acts by the Respondents as defamatory. Yet, in this case, the Respondents were given qualified immunity under a state common law of defamation that does not require it, by requiring the Plaintiff's to meet the "actual malice" standard test presented in *New York Times v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 686 (1964). Also discussed by the Appellate Court was the "common interest privilege" as defined in section 596 of the Restatement 2d of Torts. *See Zinda v. Louisiana Pacific Corp. and Hartford Accident and Indemnity*, 440 N.W.2d 548 (Wis. 1989).

> An occasion makes a publication conditionally privileged if the circumstances lead any one of several persons having a common interest in a particular subject matter correctly or reasonably to believe that there is information that another sharing the common interest has a right to know. . . .
>
> . . . The common interest privilege is based on the policy that one is entitled to learn from his associates what is being done in a matter in which he or she has an interest in common. Thus, defamatory statements are privileged which are made in furtherance of common property, business, or professional interests. The Restatement extends such privilege to partners, fellow officers of a corporation for profit, fellow shareholders, and fellow servants'. . . .

Converters Equipment Corp. v. Condes Corp., 80 Wis. 2d at 264, 258 N.W.2d 712 (1977).

Respondent Toth, armed with information provided by Respondent Salter, represents the interests of prosecutors involved with child abuse cases through the National Center for the Prosecution of Child Abuse, a program of the non-profit corporation known as The American Prosecutors Research Institute, which is a subsidiary of the National District Attorneys' Association. In this position she disseminates information regarding trial techniques, and provides, as stated by her and through her publications, material to impeach and attack professionals on a "hit list" of experts who testify for the defense. This program and activity are paid for by federal money supplied by the Office of Juvenile Justice and Delinquency. The National Coalition of State Juvenile Justice Advisory Groups observed in their 1991 report to Congress, "The discretionary grant

program [of OJJDP] frequently has been the source of funds to carry out the particular ideological agenda for OJJDP Administrators" (p. 38). In the instant case it is federal tax money that is used to support efforts to attack and harm individual citizens who are attempting to criticize constructively and improve the methods used to address the fact that human beings can abuse and harm children. The Respondent's behavior demonstrates they are not concerned with improving the accuracy of decisions made by the justice system but rather only with winning cases.

Several factors arise that diminish the Respondent's claim to immunity under the "common interest privilege". One is that the National Center provides such defamatory information at conferences and by mail across the United States and in foreign countries. These conferences and mailings are not restricted to just prosecutors. They are open to the public, inclusive of lay people, defense attorneys, public organizations, and news media. In spite of a publicly proclaimed policy of assisting only prosecutors, the National Center for Prosecution of Child Abuse has sent and continues to this day to send defamatory material to private attorneys and to others who seek to attack the Plaintiffs. This information has not been provided only to those of "like" or prosecutorial interests. The only "common interest" binding together the diverse people to whom the Respondents have supplied defamatory material is the interest and intent to damage the plaintiffs.

Secondly, Toth and the National Center go even farther than would be considered acts of professional consideration by the provision of helpful information; Toth and the Center set a goal,

as stated in the Respondents own Memorandum[2] describing the National Center for the Prosecution of Child abuse and its services:

> **Likewise, the more prepared prosecutors are for expert witnesses who make their living testifying only on behalf of child molesters (and essentially adopting theories attendant to their source of income) the less effective, and less commercially desirable, the expert will be for future alleged child molester defendants.**

Respondent Memorandum, pps. 5–6 (emphasis added).

Such a statement clearly sets the *intent* of the Respondents to harm expert witnesses willing to assist a defendant. With such *intent* regarding all "expert witnesses" for "child molesters", the Respondents show that their "belief" system is not primarily based upon the individual expert whom they may believe, as they say in this instance, to be jaded, biased, or inherently evil in their eyes, but their intent is simply based on the fact that when any expert witness presents testimony and evidence on behalf of the defendant, they are to be made "commercially undesirable". Such intent and belief are not based upon individual facts but upon a preliminary judgment that the witness must be attacked by virtue of their stance in court, and not on the merits of their reputations, arguments, or

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[2] Memorandum in Support of Defendants Toth, Peters, Rose, the Center, APRI and NDAA's Motion for Rule 11 Sanctions. This document was filed with the District Court which denied the motion for Rule 11 sanctions. The defendants did not appeal this ruling. Therefore the document is not part of the Appellate Court file. If this court wants the document it is available from the District Court.

presentations. Such actions are not conducive to the provision of reliable evidence or of the introduction of scientific information to court as established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, Supreme Court of the United States, No. 92-102 (filed June 28, 1993). Through unfounded personal attacks and defamation, without any accountability, it will eliminate responsible professionals from testifying in court.

Further, such intent and the continuing acts of the Respondents who, to this day, continue to distribute the material that is at issue in this matter, establishes malice. In spite of many warnings and demonstration by the Petitioners regarding the falsity of the Respondents' presentations and published materials, the continuing acts of the Respondents may establish more than "actual malice", but more precisely "express malice" through actions establishing that the defamatory information continues to be provided out of "ill will, envy, spite, (or) revenge". *See Polzin v. Hemorecht*, 54 Wis.2d 578, 587–88, 196 N.W.2d 685 (1972).

In granting a motion for a summary judgment, there must remain no issues of material fact. Whether or not "actual malice" existed in the present case was an issue of material fact which should be decided by a jury and clearly precludes the entry of summary judgment. The court made a clear factual finding in reaching its conclusion that no "actual malice" existed. For example, in its decision, the court made a factual finding on the apparent basis for the Defendants' belief relying on existence of certain literature. Yet, the Plaintiffs-Respondents had introduced other evidence in the record to counter such literature. Such evidence on the part of the Defendants did not go undisputed and thus a factual issue remained. The court also made a factual finding as to the acceptance of Plaintiffs-Respondents in the scientific community. Again, Plaintiffs-Respondents disputed the evidence set forth by the Defendants

and a factual issue remained. Taken in the light most favorable to the Plaintiffs-Respondents, a review of the record before the Appellate Court indicates a clear, unequivocal question of whether there was "actual malice" in the Defendants' actions remained.

The Appellate Court took note of documentation provided by the Defendants that indicated that the writings of the Plaintiff's were not acceptable to the medical and legal communities through written critiques by John E.B. Meyers, J.D., and David Chadwick, M.D. This was used to demonstrate the factual basis for the "belief" of the Defendants. We find it important to establish that the Court was not made aware of or did not attend to the fact that both Meyers and Chadwick belong to the American Professional Society on Sexual Abuse of Children (APSAC), along with Ms. Toth. This society meets regularly and discusses the issues of the prosecution of child sexual abuse. Chadwick, Meyers, and Toth have frequently appeared on the same programs at the conferences at which the defamatory material about plaintiffs is spread. Much of their literature expresses the same mind-set of the National Center for Prosecution of Child Abuse, and has attacked many defense-oriented witnesses, including the Petitioners in this case. There has been communication and cooperation between Salter, Chadwick, and Meyers about their criticisms of the work of the plaintiffs. While debate is healthy in that many issues are brought forward, both frivolous and factual, that allow an exchange of views and information that assist in establishing a middle-ground, we take note of Meyers' and Chadwick's close relationship to Respondent Toth in this case. They should not be thought of as unrelated, independent, or unbiased critics, and representatives of the majority of opinion in their fields.

In fact, the writings and work of Petitioners Underwager and Wakefield since 1984 have been supported through recent

research and the writings of others. Such professional supporting research, documentation, and presentations have been long cited by the Petitioners regarding accusations of child abuse, such as the therapist's involvement with the evaluation of children (Benedek, E.P. and Schetky, D.H. [1987], Problems in validating allegation of sexual abuse, Part 2, Clinical Evaluation, *Journal of the American Academy of Child and Adolescent Psychiatry,* 26[6]:916–921; Gardner, R. [1993] *True and False Cases of Child Sexual Abuse*, pp 263 –339), cases of "repressed memory" (Loftus, E. [1989], Misguided Memories; sincere distortions of reality, In J.C. Yuille (Ed.) *Credibility assessment,* pp 155–173, Loftus E. [1992],[discussant], *Multispecialty Symposium: Remembering "Repressed" Abuse: Initial Research, Theoretical analysis and Evaluation of the Claims,* presented at the Fourth Annual Meeting of the American Psychological Society, San Diego, CA June 20,1992,), suggestibility of children's recollections (Ceci, S.J. & Bruck, M. [1992] *The Suggestibility of the Child Witness: A Historic Review and Syntheses*, Ceci, S.J., Leichtman, M., & White, T. [1992] *Interviewing Preschoolers),* and cases of sexual abuse arising out of the divorce/custody context (Blush, G.J. & Ross, K.L. [1987], Sexual allegation in divorce; the SAID Syndrome. *Conciliation Courts Review,* 25(1):1–11; Gardner, R.A. [1987] *The Parental Alienation Syndrome and the Differentiation Between Fabricated and Genuine Child Sex Abuse).* To name all who have provided input to the medical, legal, and mental health communities which supports or provide parallels to the Respondents' views on these complex issues would require lengthy documentation that would overrun this brief. What we have provided, however, is a showing that supporting documentation and research of the views held by the Petitioners holds a wealth of valid and reliable scientific information that should not be denied to any finder of fact in any court when moving to an educated, fair, and reasonable decision. The scientific evidence continues to accumulate to demonstrate

clearly that the Plaintiff's work and their position regarding accusations of child abuse is scientifically responsible and sound.

II. Law and precedent stand on the fair practice of establishing accuracy and truthfulness when impeaching an adversarial witness.

Recently, the Grand Jury of San Diego County (June 1994) made national news by their findings during their three years of investigation of the operation of that county's child-protection agencies, the district attorney's office, and law enforcement regarding child abuse cases. The last and seventh report from that Jury was scathing in its analysis of the district attorney's office in that county, so much so, that critics of the report state that it was responsible for the ouster of San Diego District Attorney Edwin Miller, who had held that post for many years. Mr. Miller was also the president of the National District Attorney's Association, and a co-founder of the National Center for the Prosecution of Child Abuse.

The Grand Jury read over 64 books, approximately 20,000 pages of transcripts, over 300 pieces of correspondence as well as numerous newspaper and magazine articles in addition to published and unpublished monographs. They heard dozens of witnesses. They also viewed 10 videotapes. The Jury found incompetence, bias, and the failure to operate under any specific doctrine or process. They noted a case (*People v. Garcia-Garcia* , 17 Cal.App.4th 1169 (1993)) which was overturned in the Court of Appeals, Fourth Appellate District, due to the failure of the District Attorney's office to reveal information bearing on the credibility and professional competence of a principal *prosecution* witness. The Jury further noted another ill-fated sexual abuse prosecution by that county , in the civil aftermath of that case, that notice is taken of allegations of failure to

disclose and lack of truthfulness on the part of a deputy district attorney as reported in the opinion of the Court of Appeals. *See James W. v. Superior Court,* 17 Cal.App.4th 245 (1993) .

Alarmed at what its finding were during this investigation, the Grand Jury noted that the U.S. Supreme Court had stated,

> *"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is* ***not that it shall win a case, but that justice shall be done.*** *As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape of innocence suffer. he may prosecute with earnestness and vigor—indeed, he should do so. But,* ***while he may strike hard blows, he is not at liberty to strike fouls ones.*** *It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."*

San Diego County Grand Jury (quoting *Berger v. United States*, 295 U.S. 78, 79 L. Ed. 1314, 55 S. Ct. 629, 633 (1935) (emphasis added)).

> "The philosophy expressed applies equally to all public prosecutors.... Although the Grand Jury has observed some excellent lawyers in the District Attorney's Office, certain members of that office have become obsessed with the idea of 'winning cases'. the fact that *'it is their duty to see to it that those accused of crime are afforded a fair trial'* (*People v.*

> *Talle* 111 Cal.App.2d) has been forgotten or overlooked. Because the District Attorney's office is charged not only with pursuing and prosecuting criminals, but also with doing justice, the fine balance that must be struck is easily outweighed by overzealous prosecution. and atmosphere of conviction, and conviction only, can be expected to produce inadequate investigation, incomplete disclosure to the defense and sharp practices. The District Attorney must provide leadership to change any such attitudes in his office at the earliest possible time." *Id.*

The demand for prosecutorial competence and honesty abound in a wealth of case law and precedence across the country throughout our history, not only regarding the facts of a case but specifically dealing with attacks against the expert witnesses for the defense. In a recent New York case, *Clark v. New York City Transit Authority*, 580 N.Y.S.2d (A.D.1 Dept. 1992), held that in attacking the testimony of the expert trial counsel acted improperly as an unsworn witness when he said that the testimony of the witness was " ' false, absolutely false, and misleading'... It is error for trial counsel to bolster his case on summation by repeated accusations that witnesses on the other side are liars... It is error for trial counsel to accuse medical experts, without supporting evidence, of being willing to testify for a fee... 'is nothing but a paid expert who will say anything whatsoever without regard to what is right, without regard to what is truthful'."

In *Berkowitz v. Marriott Corporation* 163 A.D.2d 52 (N.Y. App. 1 Div. 1990), the New York Supreme court mandated a new trial regarding a personal injury lawsuit because of the plaintiff's counsel's statement, ". . . in an unfair and highly prejudicial attack upon credibility and competence of

defendant's expert witnesses . . . were repeatedly depicted as hired guns who were brought into litigation to 'fluff up the case'."

Again, we must remind the Court that in the Respondent's *Defendant's Memorandum in support of Defendants, et.al.* paragraph on page 12 clearly states that the Respondents regard *all* defense expert witnesses as hired guns. While hard blows must be struck for the advance of truth and in the seeking of justice, such blows must be based on truth, not just personal bias or subjective belief. The Respondents' actions have given faulty and defamatory information to prosecutors as well as other members of society through seminars and conferences. This information is being presented by prosecutors and others throughout the country, in court and outside of court, not for the purpose of bringing forth new information regarding evidence, but specifically to inflict malicious damage to the persona, reputation, and thus, the credibility of any defense expert witness. Such an act is not for the furtherance of justice, but the destruction of due process afforded to any defendant.

III. Deliberate, untrue, and malicious attacks upon adversarial expert witnesses, under the protection allowed in this case by the lower courts, dissuades such professionals from testifying on behalf of any defendant and will likely prevent the provision of exculpatory information to any court. The information that such experts bring into a court arena may provide reasonable doubt as to a criminal defendant's guilt, or absolution to a party in a civil action, or custody to a parent, and thus to eliminate such experts through this continued unchecked defamation or character assassination is to deny the accused due process.

This case is not dealing with the defamation of only these Petitioners; it sets a precedent for any and all future expert witnesses who testify on behalf of any defendant in child abuse cases or other cases. NASVO has had much experience with the extreme difficulty defendants have in finding expert witnesses to provide competent and valid scientific information to assist their defense. Over and over we hear the answer that scientists don't want to get involved, that their practice will suffer, their referrals drop off, and they will be attacked by other professionals. Should the District and Appellate Court decisions stand in this case, there will be open season on any professional who dares to testify on behalf of the accused. There will be no method available for the accused to mount a viable, reliable, informative, scientifically based defense through the testimony of an expert witness. The state cannot be relied upon to provide accurate and reliable scientific information through experts. The recent exposure of several prosecution experts, including a serologist. pathologists, dentists, and forensic crime labs who fraudulently present testimony, fabricate evidence, and falsify reports is noteworthy primarily because prosecutors used them for years, knowing they were suspect [3] . Forensic crime laboratories are completely unregulated and there are no standards of competency. Yet such putative, possibly unreliable, scientific testimony often has a great impact upon the finder of fact. The defense must be allowed to present reliable scientific evidence that may assist the finder of fact in properly weighing the evidence. For this reason, experts willing to assist a defendant must be able to respond effectively to false and defamatory personal attacks.

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[3] Gianelli, P. (1994) When the evidence is a matter of life and death. New York Times, Aug. 21, 1994. p. 15.

Not only do Toth and the Center regard defense experts as those "who make their living" in testifying only for the defense, but they also diminish the constitutional presumption of innocence, by declaring that such experts only testify on "behalf of child molesters", thus establishing the presumed guilt of the accused defendant. The mind-set of this statement goes beyond what is expected of a prosecutor, who, under the long-held standards set forth in *Berger v. United States,* 295 U.S. 78, 79 L. Ed. 1314, 55 S. Ct. 629, 633 (1935), must "refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." The Respondents' goal does not establish a legitimate means to provide information that can educate the courts as to either good or bad science by facts or even theory established through scientific process and provided under rules of evidence. Rather it establishes the methods of a zealot, who views any professional providing information to the courts on behalf of a defendant as unworthy, as the enemy, who must be barred from testifying by making that expert "less commercially desirable". The methods used to accomplish that goal are not to impeach the credibility of the witness through investigation, facts, and more current research, but to provide inflammatory, defamatory false information, call it factual, and then hide under the skirts of privilege and immunity.

Such acts are aimed not only at the Plaintiffs in this case, but, by the Respondents' own statements, at any "expert witnesses who make their living testifying only on behalf of child molesters". This means that should the ruling in the lower courts stand, not one expert witness for the defendant, who is to be presumed innocent until proven guilty, is safe from being publicly painted as deviant, a perjurer, a liar, dishonest, incompetent, unethical, and a "hired gun". Further, if so labeled by the prosecutors and others, the expert witness has no recourse available to correct the assault. Ironically, in child abuse cases

two distinct battles zones have been drawn in the field of science. The prosecution has its own stable of experts who never testify for the defense, and also "make a living" consulting and testifying only for the prosecution. It is becoming increasingly clear that credible scientific evidence does not support the positions of the prosecution's experts. Toth and the Center carefully avoid speaking to this fact. This is as old as the adversarial court system, and one that is accepted in our search for the provision of new information as the issues of child abuse is scrutinized in on-going research. To place a legal damper on one side or the other in the provision of such information will not lead to informed juries or courts. In this case, it is clear the Respondents' actions will support only the expert providing information that will guarantee prosecution, and by rendering defense experts "less commercially desirable", deny due process to the accused.

CONCLUSION

In this brief, *amicus* has reviewed, documented, and placed before this Court our examination of what we believe to be devastating to the equitable process of discovery, defense, analysis, and determination of facticity through the judicial process, should the decision by the lower courts in this case stand. We believe that to ignore the deliberate and malicious defamation by prosecution advocates of expert witnesses for the defense as the Respondents have done, for the express purpose of eliminating a defendant's right to produce such witnesses at trial would be the destruction of due process as we know it today. Adding to the already overwhelming power of the government by making agents of government immune from redress by ordinary citizens cannot increase the accuracy of the judgments of the justice system. It can only increase error, encourage misuse and abuse of the power of the state, and diminish the rights and freedoms of citizens

In 1692, the Reverend Cotton Mather stated at the end of the infamous Salem Witch Trials, "I would rather set ten witches free than to hang one innocent man". Unfortunately, this statement was made after many had lost their lives in trials that offered no equity, no hope, and no expert witnesses for the defense. To come forward in 1692 and proclaim the innocence of a person accused of being a witch was to be labeled as a witch yourself. Respondents demonstrate this error in Mr. Vaughn's letter refusing NASVO permission to file this brief when he refers to "Letter from your organization on behalf of child abusers". Respondents have already determined that the thousands of members of VOCAL groups represented by NASVO are guilty and are child abusers. We believe that should this case stand as decided in the lower courts, no witness for the defense is safe from a similar tyranny, and the rights of the accused in these cases will be seriously diminished.

Respectfully Submitted

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